No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,
Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* STUDENT PRESS LAW CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

2. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes and Other Authorities

Cited Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Student Press Law Center (SPLC) is a non-profit, non-partisan organization founded in 1974 with the mission of promoting youth involvement in civic life through journalism.

SPLC provides free educational materials and workshops to students across the country about their First Amendment rights, and its attorneys are the authors of the widely used reference text, *Law of the Student Press*.

SPLC regularly appears in this Court and other federal and state appellate courts to provide additional perspective and context as an advocate with many years of experience working directly with students whose rights to speak on matters of public concern have been suppressed by school or government officials.[1]

SUMMARY OF ARGUMENT

This Court has long held that plaintiffs need not wait for the government to enforce a speech-restrictive law before asserting a facial challenge under the First Amendment. So long as the plaintiffs allege an actual and well-founded fear that the law will be enforced against them, they have shown the existence of a justiciable controversy satisfying this Court's standing and ripeness requirements.

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1. Both Petitioners and Respondents submitted letters to the Court granting blanket consent to *amicus curiae* briefs in this case. In accordance with Supreme Court Rule 37.6, *amicus* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus* or its counsel.

These special justiciability rules are necessary in First Amendment cases because the government can use the fear of enforcement to chill speech and compel citizens to "self-censor" otherwise protected speech and expression. As a result, unless the government disavows a speech-restrictive law, any person whose speech is subject to that law has standing to assert a facial First Amendment challenge.

These standing and ripeness principles are vital to protecting student speech. The potential chilling effect of speech-restrictive laws and rules is especially powerful in the school setting because students are surrounded by authority figures and can be disciplined for their speech without the robust legal process available to ordinary citizens. As a result, students are particularly susceptible to the chilling effect of laws and school rules that burden their right to speak and express themselves.

In addition, students often find their meritorious First Amendment challenges mooted because they graduate and cease being subject to the speech-restrictive laws or school rules. The ability to assert pre-enforcement facial challenges to these laws is critical to provide meaningful opportunities for students to defend their First Amendment rights in the courts.

In sum, the Court should reject the Sixth Circuit's holding below and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them if they engage in their desired speech.

ARGUMENT

I. STANDING AND RIPENESS ARE SATISFIED IN FIRST AMENDMENT CASES IF THE PLAINTIFFS ALLEGE AN ACTUAL AND WELL-FOUNDED FEAR THAT THE SPEECH-RESTRICTIVE LAW WILL BE ENFORCED AGAINST THEM.

As this Court repeatedly has acknowledged, the government can suppress protected speech without actually prosecuting its citizens or otherwise taking action against them. *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). It does so through laws that instill the *fear* of enforcement, thereby silencing those who might otherwise speak. The result is "self-censorship; a harm that can be realized even without an actual prosecution." *American Booksellers Ass'n,* 484 U.S. at 393.

To prevent the government from compelling citizens to "self-censor," this Court has long permitted plaintiffs to challenge laws on First Amendment grounds *before* any actual enforcement by the government (and, in fact, before they even engage in the desired speech). *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *American Booksellers Ass'n,* 484 U.S. at 393; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301–03 (1979).

This rule reflects the importance of the First Amendment and the unique concern that the mere existence of speech-restrictive laws can have a "chilling

effect" on citizens' free speech and expression. As this Court has explained, First Amendment rights "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) ("The mere potential for the exercise of [the power to restrict speech] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").

As a result, to satisfy standing and ripeness concerns in First Amendment cases, this Court has required only that plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them." *American Booksellers Ass'n*, 484 U.S. at 393. That allegation is sufficient to establish the risk of "chilling effects" and "self-censorship" and thus create a justiciable controversy under the First Amendment. *Id.* at 393. Importantly, the government cannot defeat standing in this type of pre-enforcement challenge simply by asserting that the plaintiffs ultimately would not have been prosecuted for their speech. To eliminate the danger of self-censorship, and thus eliminate the justiciable issue, the government must disavow the law altogether. *Id.*; *Babbitt*, 442 U.S. at 302.

The Sixth Circuit's holding below departed from this long-standing and straightforward doctrine, instead applying a lengthy, convoluted analysis that considered the likelihood that an enforcement action would be brought against Petitioners for their speech. (Pet. App. 6a-18a.) The Court should reject that analysis and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge to a speech-restrictive law if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them and the government refuses to disavow the challenged law. *American Booksellers Ass'n,* 484 U.S. at 393.

II. THIS COURT'S STANDING AND RIPENESS RULES FOR PRE-ENFORCEMENT FACIAL CHALLENGES ARE VITAL TO PROTECTING STUDENTS' FIRST AMENDMENT RIGHTS.

This Court's First Amendment standing and ripeness precedent is vital to ensuring that students can exercise their First Amendment rights to speak on matters of public concern. Students operate under special First Amendment rules that, in the school setting, are less robust than those of ordinary citizens. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Nevertheless, the Court permitted school officials to suppress or punish student speech that would "materially and substantially interfere" with the operation of the school. *Id.* at 509.

In the years since *Tinker*, courts have struggled to draw a clear line between student speech that substantially interferes with school operation and speech that, while controversial or inflammatory, remains solidly protected even for students. *Compare Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011) (holding that the First Amendment was not violated when student was punished for speech on her MySpace page ridiculing another student), *and Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070–72 (9th Cir. 2013) (holding that the First Amendment was not violated when student was punished for violent content on MySpace page and in instant messages), *with J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928–31 (3rd Cir. 2011) (*en banc*) (holding that the First Amendment was violated when student was suspended for creating offensive MySpace page about his school principal). As explained below, this Court's long-standing First Amendment standing and ripeness precedent are vital to protecting student speech in light of the *Tinker* standard and the special nature of speech in the school setting.

A. Students are particularly susceptible to the chilling effects of laws and rules that restrict protected speech.

Students are surrounded by authoritarian figures. Their school activities are monitored and often recorded and they can be subjected to serious punishment by school officials—anything less than a 10-day suspension—with little, if any, adjudicative process. *See Goss v. Lopez*, 419 U.S. 565 (1975). These aspects of school life create an atmosphere where many students are reluctant to challenge authority. This, in turn, makes students "particularly vulnerable to having their speech chilled"

by laws that restrict protected speech. Case Comment, *Third Circuit Applies* Tinker *to Off-Campus Student Speech.*—J.S. ex rel. Snyder v. Blue Mountain School District, 125 Harv. L. Rev. 1064, 1070 (2012) (noting that "school discipline by necessity involves relatively informal proceedings, which can be arbitrary and unfair," and that "students may be reluctant to push boundaries when their rights are unclear" and "might also legitimately fear informal reprisals if they seek to challenge school officials in court"); Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & Pub. Pol'y 481, 499–503 (2009) (discussing the enhanced chilling effects of "speech codes" on college campuses); Tova Wolking, *School Administrators as Cyber Censors: Cyber Speech and First Amendment Rights*, 23 Berkeley Tech. L.J. 1507, 1528–29 (2008) (discussing the special circumstances present in the school setting which make the chilling effect of speech restrictions particularly dangerous).

Furthermore, students increasingly communicate and share ideas through the internet and social media, where those ideas can be accessed by millions of people around the world. *See J.S.*, 650 F.3d at 940 (noting the "'everywhere at once' nature of the internet"); *Wynar*, 728 F.3d at 1064 ("students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically…"). Schools and government officials have responded to these changing means of student communication with aggressive and at times dubiously constitutional laws and school rules. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying*, 46 Wake Forest L. Rev. 641, 641–42 (2011) (discussing schools' attempts to address cyberbullying issues).

For example, states across the nation have begun enacting laws aimed at prohibiting the harassment of other students or teachers both in the classroom and on the internet. *See State Cyberstalking and Cyberharassment Laws*, Nat'l Conf. of State Legislatures (last updated Dec. 5, 2013), *available at* http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx (providing a summary chart of state cyberharassment laws). These laws often are exceedingly broad, reaching not just petty schoolhouse bullying but also controversial political and social topics at the heart of the First Amendment. *See, e.g.*, Iowa Code § 280.28 (2007) (defining harassment as "any electronic, written, verbal, or physical act or conduct toward a student which is based on any actual or perceived trait or characteristic of the student" including "political party preference" or "political belief"); La. Rev. Stat. Ann. § 17:416.13 (2013) (defining "bullying" as including "[w]ritten, electronic, or verbal communications including but not limited to calling names . . . or spreading untrue rumors"); N.C. Gen. Stat. § 14-458.2 (2012) (imposing criminal penalties on certain online behaviors if done "[w]ith the intent to intimidate or torment a school employee," including the online posting of a school official's photo or the posting of a school official's "personal … information").

And even in states without such laws, school officials frequently seek to suppress or punish speech by students on important social issues that are viewed as too controversial or offensive. *See* Majeed, *supra*, at 501–03 (discussing the use of speech codes by universities to suppress unfavorable speech and creating a sense of entitlement among students to be free from "offensive" or "disagreeable" speech); Alan Charles Kors & Harvey

A. Silvergate, *The Shadow University: The Betrayal of Liberty on America's Campuses* 5 (1998) (discussing the suppression of disagreeable speech by universities, including through the use of speech codes to prohibit "speech that 'offends'").

The pre-enforcement facial challenge has been an indispensible tool in overturning excessively broad enactments penalizing speech that campus decision-makers subjectively deem inappropriate. *See, e.g., Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 203 (3d Cir. 2001) (entertaining facial challenge brought by students and parent volunteer who asserted that they "feared that they were likely to be punished" and enjoining enforcement of school district "harassment" policy that prohibited, among many other things "derogatory comments" or "negative comments"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 305 (3d Cir. 2008) (entertaining facial challenge brought by college student who, while he had not been threatened with discipline under a "harassment" policy that the court ultimately enjoined as unconstitutionally overbroad, asserted that he "felt inhibited in expressing his opinions in class concerning women in combat and women in the military").

Without the ability to bring pre-enforcement, facial challenges to these speech restrictions, many students will simply forgo their First Amendment rights. No matter how strong their beliefs, few students will expose themselves to school discipline—tarnishing their school record and threatening their college and job prospects—in the hope that the legal system might later vindicate them. Instead, students will simply stay silent—resulting in the compelled self-censorship that this Court's precedent

has long condemned. *See Ashcroft*, 542 U.S. at 670–71. The Court should avoid this damaging consequence by reaffirming its traditional, broad view of standing and ripeness in First Amendment cases.

B. Without broad pre-enforcement standing rules, many student speech lawsuits will be mooted before final adjudication.

First Amendment challenges involving student speech also face another unique hurdle: mootness. It is common for students challenging a restriction on school speech to graduate while the lawsuit is pending, thereby mooting the First Amendment claim. *See, e.g., Lane v. Simon*, 495 F.3d 1182, 1186–87 (10th Cir. 2007) (students' First Amendment challenge to actions of school became moot when the students graduated because the school "can no longer impinge upon plaintiffs' exercise of freedom of the press"); *Fox v. Board of Trs. of the State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) ("This court has consistently held that students' declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students…."); Wolking, *supra*, at 1529 ("A school official acts as both prosecutor and judge when he moves against student expression because the short duration of most sanctions makes the promise of judicial review an empty one.") (internal quotations and alterations omitted).

Without robust pre-enforcement standing and ripeness rules, this mootness problem will make many student speech laws virtually unchallengeable. Indeed, under the Sixth Circuit's view of standing and ripeness, students would need to wait at least until the school

disciplinary process begins—and possibly until that process concludes—before bringing suit. For high school students in particular, this delay would prevent many First Amendment claims from being fully adjudicated before graduation.

The option of a viable pre-enforcement facial challenge is especially important in the school setting because so many students' school experiences are unique, irreplaceable, and insufficiently redressed by money damages alone. For example, New Jersey students successfully brought a facial challenge to enjoin enforcement of an unconstitutionally overbroad school board rule that purported to give the school district authority to remove any student from extracurricular activities for any unlawful behavior anywhere, even off-campus during summer vacation and even in violation of non-criminal municipal codes. *G.D.M. v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist.*, 48 A.3d 378 (N.J. Super. 2012). Because the regulation successfully challenged in *G.D.M.* gave school decisionmakers essentially standardless discretion to punish or not to punish, no student would have been able to surmount the "certainty" hurdle to establish standing applied by the Sixth Circuit below. The only plaintiff with standing under the decision below would be a student actually disqualified from extracurricular participation. It demands too much to say that a student must undertake the life-altering consequences of being a "sacrificial plaintiff"—forfeiting athletic or artistic participation that could be decisive in earning a ticket to college—to overturn a chillingly overbroad policy. And, by the time the student engages in that disfavored speech and ultimately is disqualified from extracurricular school activities, there may not be time

to secure a final adjudication on the First Amendment issue before the case is mooted by graduation, leaving the law intact.

In addition, the ephemeral nature of many school rules renders pre-enforcement challenges all the more necessary. School policies are changed easily and often, allowing school administrators to circumvent legal challenges to those rules. Although the voluntary cessation doctrine should protect against this behavior, this protection is not absolute. *See Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969, at *2 n.1 (W.D. Ohio June 12, 2012) (discussing the voluntary cessation doctrine). Schools can formally adopt revised rules and regulations, *see Sossamon v. Texas*, 131 S. Ct. 1651, 1670 (2011) (Sotomayor, J., dissenting) ("[prison] officials may change the policy while litigation is pending … The fact of 'voluntary cessation' may allow some of these claims [challenging the policy] to go forward, but many will nonetheless be dismissed as moot…"), or other intervening events, such as the student's graduation, may otherwise moot the issue, *see DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (student's challenge to law school's admission procedures was mooted by fact that student was guaranteed to be permitted to graduate). Further, if the Sixth Circuit's holding were followed, the voluntary cessation doctrine would fail to protect students who were excluded from court in the first place on the basis that the school had "voluntarily" decided not to fully enforce the rule at issue *before* the lawsuit began. *See supra*, at 11 (under the Sixth Circuit's standard, students would need to wait at least until school's disciplinary process is begun before bringing suit).

In sum, this Court's traditional rules governing standing and ripeness in First Amendment cases are necessary to provide meaningful opportunities for students to defend their free speech rights. The Court should reject the Sixth Circuit's holding below and reaffirm that standing and ripeness principles are satisfied in a facial First Amendment challenge if the plaintiffs allege an actual, well-founded fear that the law will be enforced against them and the government refuses to disavow the challenged law.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

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